No. 14985

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ADRIAN SCOTT,

Appellant,

vs.

RKO RADIO PICTURES, a corporation,

Appellee.

APPELLANT'S PETITION FOR REHEARING.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Textbooks

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To the United States Court of Appeals for the Ninth Circuit:

Appellant respectfully asks that this court grant a rehearing en banc upon the following grounds:

1. This is a diversity case. In the absence of declared state law or policy, the United States courts have no power, especially as against a jury verdict, to declare conduct to constitute moral turpitude as a matter of law.

2. A challenge to the authority of public officials has never in the history of the United States been held to be vile, depraved, or base conduct. If a change in American traditions is to come about, it should not be imposed by a court as against a jury verdict.

3. It is not a "discredit" to the law to reach a conclusion different from the conclusion reached in an earlier case. Fresh reconsideration and the acknowledgement of change are marks of great stature, and are in the course of the best traditions of the Supreme Court of the United States.

4. On January 21, 1957, the Supreme Court of the United States granted ceriorari in the decision in *Wilson v. Loew's Inc.*, 142 A. C. A. 191, a decision which had sustained a demurrer against an action founded on the alleged concerted activity of motion picture producers to "blacklist" persons who refused to answer questions before the House Committee on Un-American Activities. This order implements, it is submitted, the change in attitude of the Supreme court evidenced by the *Slochower* decision (350 U. S. 551), and urgently suggests reconsideration of the *Lardner* and *Cole* decisions relied on by this court in its judgment of affirmance.

Introduction.

Appellant failed in his former briefs to evaluate the significance of the announced principle that refusal to answer the Committee's questions constituted moral turpitude as a matter of law; and failed to present for this court's consideration the consequences of the fact that this case was commenced in the Superior Court of the State of California [R., Vol. I, p. 3], that the case is in the United States courts only by reason of diversity. California courts are extremely reluctant, and have customarily refused, to declare public policy in the absence of a legislative act. The decision of this court that refusal to answer constituted moral turpitude as a matter of law is a declaration of a public concept of morals, and it is sub-

mitted is beyond the power of the United States court in a diversity case.

The decision of the Supreme Court of the United States to grant certiorari in *Wilson v. Loew's, supra,* could not, of course, have been known to anyone prior to January 21, 1957, although appellant has urged that the *Slochower* decision requires overruling *Cole* and *Lardner.* However that may be, in the light of the present stature of the *Wilson* case, this court should reconsider its judgment in the present case.

The remaining point here urged considers the merits of the court's decision. The first, the tradition of *quo warranto* addressed to government by a citizen—is a different aspect of the fundamental argument previously made, that Scott's conduct in peacefully seeking a determination of the Committee's power, though made at his hazard, cannot be against public morals.

The final point here urged comes into the case for the first time with this court's opinion, by reason of the statement that "An opposite result in two companion cases so nearly alike would discredit the law." Consistency in decisions should derive from the internal principle of justice; the search for consistency cannot justify a sameness if the first judgment was erroneous. The growth, adaptability, and standards of American jurisprudence depend on a consistent reshaping of particular decisions to fundamental principles of justice, even if a given result overturns an earlier decision.

We should also point out that the judgment of this court does not notice the principal argument made by appellant, that the *Cole* and *Lardner* decisions are inconsistent with *Slochower* and must be deemed overruled, and that the determination of public morals is a question of fact.

I.

A United States Court Does Not Have the Power, in a Diversity Case, to Declare Public Morals as Against the Verdict of a Jury.

No decision of any court of the State of California has been cited, and we have been unable to find any, which holds or even says that contempt of Congress constitutes moral turpitude. No statute or other official declaration of public policy so characterizes a refusal to answer.

The decision of the District Court of Appeal in *County of San Bernardino v. Creamery Co.,* 103 Cal. App. 367, quotes from 6 Cal. Jur. at page 1099 as follows:

> "The policy of the state can be ascertained only by reference to the constitution and laws passed under it, or which is the same thing, to the principles underlying and recognized by the constitution and laws. Courts are apt to encroach upon the domain of the law-making branch of the government if they characterize a transaction as invalid because contrary to public policy, unless the transaction contravenes some positive statute or some well established rule of law." (P. 373.)

See also discussion in

> *Maryland Casualty Co. v. Fidelity Co.,* 71 Cal. App. 492 at 497.

Diversity jurisdiction must follow state law and policy. (*Angel v. Bullington,* 330 U. S. 183, 192 (1947).)

> "The question, what is the public policy of a State, and what is contrary to it, if inquired into beyond these limits (the Constitution and laws and judicial decisions made known to us) will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range

> of judicial duty and functions and upon which men may and will complexionally differ. * * * We disclaim any right to enter upon such examination, beyond what the State Constitutions, and laws, and decisions necessarily bring before us."
>
> Story, J., in *Vidal v. Girard,* 2 How. 127, 198, 11 L. Ed. 205, 234 (1844).

The *Lardner* decision and the opinion in the present case hold that refusal to answer the Committee's question constitutes moral turpitude as a matter of law. Such a declaration would seem beyond the powers of a United States court to make; and the fact that it is against a jury's verdict underscores the point here argued: if a jury of the state's citizens says, as a matter of fact, that the conduct was not offensive to public morals, does it not appear to be beyond the rightful powers of a United States court to hold the contrary as a matter of law?

Appellant has contended that the determination of public morals is a question of fact (see *Sinclair v. United States,* 279 U. S. 633, and *United States v. Murdock,* 290 U. S. 389, at 397; App. Op. Br. pp. 33 *et seq.*). But even if it be within the powers of the State Legislature to define moral turpitude; and even if in the absence of a legislative declaration, a state court could in such a case hold such conduct to constitute moral turpitude; it would nevertheless appear to be beyond the power of a United States court, particularly in overturning the jury's verdict, to initiate a state's public policy in the matter of morals.

The exigencies of a petition for rehearing have not permitted complete development of this point. We submit the point demonstrates the necessity for fuller research and study and for mature deliberation.

II.

American Tradition Has Encouraged Private Challenge of Official Authority; to Brand Such an Attempt as Moral Turpitude as a Matter of Law Is Error.

Submission to excessive authority, without challenge, is in the deepest sense *unAmerican.*

"The doctrine of non-resistance against arbitrary power and oppression, is absurd, slavish and destructive of the good and happiness of mankind" (Art. V, Declaration of Rights, Constitution of Maryland, 1776, American Charters, Constitutions and Organic Laws, Government Printing Office, 1909, p. 1647). From the time of the American colonies, through Samuel Adams (*"On Resistance to Tyranny"*), Henry Thoreau (*"Civil Disobedience"*), the American Quakers, to the present day (Maury Maverick, *"Blood and Ink"*), the best American tradition has encouraged and even ennobled peaceful protest against questioned excesses.

While acquiescence may make life easier for the moment, in the long run the presumed goals of a democracy and the best aims of society are not served by silence. Just government acquires authority not by power but by esteem, and esteem is not won by imprisonment as the price of indignation.

For these reasons, the right to challenge, to test by lawful means, the felt abuses of government have been deservedly held high in the opinion of the American community. True, the challenger must incur the risk of being wrong, and must pay, if he is wrong, for a miscalcu-

lation. But this is not to say that his challenge constitutes immoral conduct or that it is offensive to public conventions.

In any event, it would appear to be a determination which any government agency, including a court, should approach with extreme delicacy, and should, it is submitted, be avoided if a body of the citizenry has determined to the contrary. If the public, as represented by the jury, has found nothing offensive to public morals in Scott's making such a challenge, we respectfully insist that it is error for a court to declare as a matter of law that such a challenge is offensive to public morals.

III.

The Cole and Lardner Decisions Should Be Recognized as Having Been Overruled by Slochower.

Overturning precedent, when reconsideration or intervening circumstances require, far from discrediting the law, is its very life. Indeed, the practice of overturning precedent is itself not without precedent, but on the contrary, is amply documented by the greatest tribunal in the history of civilization (see, *e. g., W. Va. State Bd. of Ed. v. Barnette,* 319 U. S. 624; *Pollock v. Farmers' Loan & Tr. Co.,* 157 U. S. 429; *Girouard v. United States,* 328 U. S. 62; *Helvering v. Hallock,* 309 U. S. 106).

We respectfully urge that the *Cole* and *Lardner* decisions were erroneous, and have in any event been overruled by *Slochower.* If the court is persuaded of the foregoing, a frank avowal would be a credit to the administration of justice, not a discredit.

IV.

The Granting of Certiorari in Wilson v. Loew's, Supra, Supports a Reconsideration of the Instant Judgment.

It is, of course, too early to predict the ultimate decision in *Wilson v. Loew's.* However, in view of the fact that the case went up on demurrer and dealt with the economic boycott of those who refused to answer the Committee's questions, it is not too much to say that the action of the Supreme Court in granting certiorari is another step in the direction indicated by *Slochower,* and away from the *Cole* and *Lardner* decisions of this court.

Conclusion.

The contract cases, of which the present case is one, arose from a wish on the part of the motion picture industry, employers and employees alike, to determine by judicial means whether certain conduct of a Committee of Congress was within its powers. Hundreds, perhaps thousands, have suffered uprooting of their economic lives in the intervening years. Whatever may be said about some of the participants in that ordeal,—employers and employees alike,—the quality of justice to be administered in these cases should not be diluted or stinted one whit. The dignity of the law does not permit lowering by reason of the stature of the accused or the iniquity of the accusation.

The time has now come to say that peaceable challenge, even though mistaken, is not immoral or offensive or contrary to American traditions.

We respectfully request that the petition for hearing be granted.

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Certificate of Counsel.

We are attorneys for the appellant. It is our judgment that this Petition for Rehearing is well founded and not interposed for delay.

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MORRIS E. COHN.